

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVINE LEE DAVENPORT,

Defendant-Appellant.

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UNPUBLISHED

August 5, 2010

No. 287767

Kalamazoo Circuit Court

LC No. 2007-000165-FC

Before: STEPHENS, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder. MCL 750.316. The trial court sentenced defendant to life in prison without the possibility of parole. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first contends that he was denied his due process rights when the trial court required him to wear shackles during the trial. Although defendant's trial counsel requested that defendant's right hand be freed to enable him to write notes, defendant's trial counsel did not otherwise object to defendant being shackled. Therefore, this issue was not properly preserved before the trial court. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Generally, a defendant has a due process right to be free of shackles or handcuffs during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this right is not absolute; a trial court may order a defendant to be restrained where it "is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Although a trial court may order a defendant to be restrained during trial, it is well settled that a trial court may not do so as a matter of routine. See *Deck v Missouri*, 544 US 622, 627; 125 S Ct 2007; 161 L Ed2d 953 (2005) ("Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so."). And it is not sufficient that a law enforcement officer has expressed a preference for the use of restraints. *People v Banks*, 249 Mich App 247, 258; 642 NW2d 351 (2002). Instead, before a trial court can order a defendant to be restrained, it must make specific findings—on the record and supported by record evidence—that justify restraining the particular defendant. *Deck*, 544 US at 632 (noting that trial courts must take into account the circumstances of the particular case before ordering a defendant to be restrained). In this case, the trial court failed to make any findings on the

record—let alone findings that were supported by record evidence that warranted such an extreme precaution. Therefore, the trial court plainly erred. See *Dunn*, 446 Mich at 425.

Although it was error for the trial court to order defendant to be restrained without making the requisite findings, in order to warrant relief, defendant must still show that this error prejudiced his trial. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Typically, a defendant will show prejudice by demonstrating that his restraints were visible to the jury. *Id.* at 36-37; see also *Deck*, 544 US at 635 (stating that shackling is inherently prejudicial and, for that reason, a defendant need not demonstrate actual prejudice in order to warrant relief where the defendant's restraints were visible to the jury).

Here, the trial court took precautions to ensure that the jury did not see the restraints: the trial court had a curtain placed around the defense table, instructed the parties on the procedures for standing, and had the shackles removed before defendant walked to the witness stand. Despite these procedures, defendant argues that the jury must have seen that his left hand was shackled on the basis of a video from the trial that purportedly shows that his wrist shackle was visible. The video does show a visible cuff around defendant's wrist. However, it is also clear that the video was recorded from a height. And there is no record evidence that the video accurately portrays the view from the position of the jurors. Because the video does not appear to portray the view from the jury box, we cannot conclude that the jurors actually saw the restraint on defendant's left wrist. Defendant has not shown that his restraints were visible to the jury and, for that reason, has not met his burden of showing prejudice. *Horn*, 279 Mich App at 37.

Even if we were to conclude that defendant demonstrated that his restraints were visible to the jury, this would not by itself warrant relief. Where a trial court orders a defendant to be visibly shackled without adequate justification, the error is still subject to harmless error review. *Deck*, 544 US 635. In order to be considered harmless, the prosecution must normally "prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Id.*, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967); see also *Lakin v Stine*, 431 F3d 959, 966 (CA 6, 2005) (applying the harmless beyond a reasonable doubt standard to a shackling error and concluding that the error did not warrant relief because the error was harmless in light of the overwhelming evidence against the defendant). However, where—as is the case here—the constitutional error is unpreserved, the defendant bears the burden of proving that the shackling error prejudiced his trial. *Carines*, 460 Mich at 764; see also *United States v Miller*, 531 F3d 340, 346 (CA 6, 2008) (examining defendant's unpreserved claim that he was improperly restrained for plain error).

After carefully reviewing the evidence adduced at trial in light of the shackling error, we conclude that defendant has not demonstrated prejudice. Defendant's right hand was free throughout the trial and the jury saw defendant walk to the witness stand without restraints. Moreover, the trial court declined the prosecutor's request to have defendant shackled again after he testified. Thus, to the extent that the jury might have seen defendant's restraints, the exposure was quite limited. Given the substantial evidence of defendant's guilt, we conclude that any error in shackling defendant was harmless. See *Carines*, 460 Mich at 763-764. For the same reason, we cannot conclude that defendant's trial counsel's failure to properly object to defendant's shackles constitutes the ineffective assistance of counsel warranting relief. Defendant has failed to demonstrate that any deficiency in this regard prejudiced his trial.

*People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (“To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.”).

Next, defendant contends that he was denied his constitutional right to a speedy trial. This Court reviews a defendant’s claim of deprivation of speedy trial rights by balancing factors set forth in *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). See *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). The following four factors are relevant to determining whether a defendant has been denied the right to a speedy trial: “(1) the length of delay, (2) the reason for delay, (3) the defendant’s assertion of the right, and (4) the prejudice to the defendant.” *Id.* Where a delay is less than 18 months, the defendant bears the burden of showing prejudice. *Id.* at 262.

In this case, defendant agrees that the delay was approximately 16 months and that he has the burden to show prejudice. *Id.* In examining the reasons for the delay, we note that many delays were the result of scheduling and docket issues, which weigh against the prosecutor but are given a neutral tint. *Id.* at 263. The remainder of delays—slightly more than six months—are attributable to defendant. On this record, we conclude that the reasons for the delay and the length of the delay do not weigh in favor of concluding that defendant was denied his right to a speedy trial. *Id.* We also do not agree that defendant suffered prejudice as a result of the delays.

Defendant argues that he was prejudiced by this delay given that “a critical defense witness” died. Defendant states that the witness would have testified that, immediately following the victim’s death, she treated the wounds that defendant received when the victim attacked him with a box cutter. On appeal, defendant does not provide details regarding this testimony and how it might have affected his trial. Further, defendant failed to mention the witness during his interview with police and failed to produce the jacket he claimed was cut when the victim stabbed him. Police officers also found the box cutter the victim allegedly used inside a tool bag in the trunk of the vehicle defendant drove and there was no evidence of blood on it. Finally, the medical examiner testified that the victim’s injuries were not consistent with defendant’s testimony. Given the totality of the circumstances, we conclude that defendant was not deprived of his right to a speedy trial. See *Williams*, 475 Mich at 261-265.

Next, defendant contends that there was insufficient evidence to show that he acted with premeditation and deliberation. This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we must examine the evidence presented at trial in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

In order to prove premeditation, the prosecution must present evidence that there was some time span between the defendant’s initial homicidal intent and the defendant’s act that caused the victim’s death. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (quotations omitted). “The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a ‘second look.’” *Id.* (citations omitted).

Circumstantial evidence may constitute satisfactory proof of premeditation and deliberation. See *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008).

In this case, there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant acted with deliberation and premeditation. The medical examiner testified that the victim's injuries were consistent with pressure being applied to both sides of her throat and that it takes approximately 30 seconds to choke a person to unconsciousness and another four to five minutes to strangle a person to death. A rational juror could conclude that defendant had time to take a second look at his actions during the time between the victim's unconsciousness and death. *Gonzalez*, 468 Mich at 641 (noting that "[m]anual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.'"). Thus, there was sufficient evidence from which a reasonable jury could have found the requisite premeditation beyond a reasonable doubt. *Id.*

Next, defendant argues that the trial court abused its discretion when it denied in part his motion to suppress incriminating statements he made during a custodial interrogation. Specifically, defendant argues that he was not properly advised of his rights and that the police officers should have ceased questioning him after he requested an attorney. Based on these violations, he contends that the trial court should have suppressed all his statements rather than just a portion of the statements.

This Court reviews de novo a trial court's decision to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We review a trial court's factual findings for clear error. *Id.* Review of a trial court's decision concerning whether a statement was involuntary requires this Court to conduct an independent analysis of the record to determine whether the trial court's ruling was clearly erroneous. *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988). This Court gives "deference to the trial court's findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor." *Id.* (quotations omitted).

After defendant's arrest, several police officers interrogated defendant during a span of more than eight hours. Before the interrogation, a police officer advised defendant of his right to remain silent and have an attorney. A short time into the interview, defendant stated: "[i]f I need to talk to a lawyer about this to find out what—what I need to do, then that's what I need to do. But I am not just going to—it's just crazy." The interrogating officer, Detective Brian Beauchamp, responded by stating "right" and the interrogation continued for an extensive amount of time wherein defendant admitted to helping dispose of the victim's body, but denied killing the victim. Beauchamp transcribed defendant's version of events and asked defendant to sign the statement. Defendant refused and stated: "Okay. I can't talk to a lawyer first before I sign this stuff, man?" and "I need some legal advice." Beauchamp then terminated the interrogation and left the interview room. Thereafter, Captain Jim Mallery, entered the interview room and informed defendant he would return to the Kalamazoo County Jail. Mallery left and returned with a cigarette lighter that defendant had been promised, and as Mallery turned to leave the room, defendant stated "[s]o what am I getting charged with?" Mallery again advised defendant of his rights and interrogated defendant for several more hours, during which defendant confessed to killing the victim but stated that he did so in self-defense.

Before trial, defendant moved to suppress the statements made to Beauchamp and Mallery, arguing that he was denied his right to counsel and that his statements were involuntary. The trial court granted in part and denied in part defendant's motion to suppress. The trial court found that defendant did not make an unequivocal request for an attorney when he stated "[i]f I need to talk to a lawyer ... then that's what I need to do", however, the court found that defendant invoked his right to counsel when he refused Beauchamp's request to sign his first statement. The trial court suppressed the statements from that point until defendant reinitiated contact with Mallery. The trial court also found that defendant's statements were knowingly and voluntarily made.

Police must inform a suspect in custody that he has the right to remain silent and the right to have an attorney present before being questioned. *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). To invoke the right to counsel, an accused must make a statement that can, "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994) (quotation omitted). An ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," is insufficient. *Id.* Once a suspect invokes his right to counsel, police must cease all interrogation until counsel has been made available unless the suspect initiates further communication. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). An accused "initiates" further communication with law enforcement when he makes a statement that evinces a "willingness and a desire for a generalized discussion about the investigation" that could "reasonably have been interpreted by the officer as relating generally to the investigation." *Oregon v Bradshaw*, 462 US 1039, 1045-1046; 103 S Ct 2830; 77 L Ed 2d 405 (1983). However, statements that are merely "a necessary inquiry arising out of the incidents of the custodial relationship" do not amount to an initiation of further communication with police for purposes of restarting interrogation. *Id.*

The trial court did not err when it determined that defendant did not invoke his right to counsel near the beginning of the interrogation when he stated: "[i]f I need to talk to a lawyer about this to find out what—what I need to do, then that's what I need to do. But I am not just going to—it's just crazy." This statement was not an unequivocal request for an attorney and a reasonable officer would understand that defendant only "might" be invoking or considering his right to counsel. See *Davis*, 512 US at 461-462 (holding that the defendant's statement that "maybe I should talk to a lawyer" was not an unequivocal request for counsel).

Similarly, the trial court did not err when it concluded that defendant reinitiated contact with Mallery when he asked "[s]o what am I being charged with?" In this case, Mallery entered the interview room and informed defendant that he would be transported back to jail and asked if defendant wanted a "light." These statements did not amount to "initiation" of further communication with defendant for purposes of *Miranda* because they simply related to the routine incidents of the custodial relationship and did not relate to the criminal investigation. See *Bradshaw*, 462 US at 1045. After Mallery lit defendant's cigarette and turned to leave the room, defendant asked him "[s]o what am I being charged with." This statement evinced a "willingness and a desire for a generalized discussion about the investigation" that Mallery could "reasonably have ... interpreted ... as relating generally to the investigation. *Id.* at 1046; see also *id.* at 1041-1044 (stating that the question "[w]ell, what is going to happen to me now?" initiated

contact with police for purposes of *Miranda*). After defendant initiated contact, Mallery properly advised defendant of his rights; defendant's argument to the contrary lacks merit.

In addition, the trial court did not err when it determined that defendant's statement to the police was voluntary. *Cipriano*, 431 Mich at 339. An involuntary statement made by a defendant introduced in a criminal trial for any purpose violates that defendant's due process rights. *Id.* at 331. The determination whether a statement was voluntary "should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker' or whether the accused's 'will has been overborne and his capacity for self determination critically impaired.'" *Id.* at 333-334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In making this determination a trial court should consider:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

The presence or absence of one factor is not dispositive. *Id.* Instead, whether a statement is voluntary depends on the totality of the circumstances surrounding the statement. *Id.*

In this case, the record indicates that, at the time of the interrogation, defendant was a 41-year-old man with an 11th grade education who had numerous prior contacts with police. While the interrogation lasted nearly nine hours, our Supreme Court has held that a statement given in similar circumstances was voluntary. See *People v Sexton (After Remand)*, 461 Mich 746, 748-750, 754; 609 NW2d 822 (2000). And, although defendant was held for several days before his interrogation, he was held on other charges, and delay alone is insufficient to find defendant was coerced. *Cipriano*, 431 Mich at 339. Both Beauchamp and Mallery properly advised defendant of his constitutional rights and defendant waived those rights and agreed to participate in the interview. Beauchamp testified that defendant was given access to a restroom. And, the record supports that defendant was provided cigarettes and something to drink. Beauchamp and Mallery also testified that they took breaks during the interrogation. Defendant was not under the influence of drugs or any other intoxicants, he did not appear tired, and did not ask to stop the interrogation. He also did not indicate that he could not continue or that he was uncomfortable or sleepy. Defendant did not require immediate medical care and he was not threatened or promised anything. On this record, the trial court did not clearly err in determining that defendant's statements were voluntarily made. *Akins*, 259 Mich App at 563.

Finally, defendant contends that he was denied the effective assistance of trial counsel. Defendant does not provide any analysis as to how his counsel was ineffective and he cites nothing in the record to support his argument. Therefore, he has abandoned this claim of error on appeal. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly